Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-336–02 OF 2022
HADHARIAH SYED ISMAIL, GUNALAN MUNIANDY AND AZIMAH OMAR JJCA
4 APRIL 2023

Arbitration — Award — Setting aside — Parties referred dispute to arbitral tribunal — Arbitral tribunal applied Malaysian limitation law and not Indian limitation law as provided under parties' agreement — Arbitral tribunal decided that defendant's action not barred by limitation — Plaintiff applied to set aside award by arbitral tribunal — High Court dismissed plaintiff's application — Whether time limitation was a matter of procedural law or substantive law — Whether award by arbitral tribunal ought to be set aside pursuant to s 37 of the Arbitration Act 2005 — Whether High Court's decision plainly wrong — Arbitration Act 2005 ss 30, 37 & 42 — Limitation Act 1953 — Model Law article 34

Pursuant to a production sharing contract ('the PSC'), the Government of India had granted permission to the plaintiff, the defendant and two other companies ('the parties') to conduct petroleum exploration in the specified area ('the contract area'). The parties then entered into a joint operating agreement ('the JOA') which, inter alia, provided that the expenditures incurred by the defendant as the operator for the petroleum operations ought to be shared among the parties in proportion to their respective participating interests. A dispute arose in relation to the parties' liability for the expenses incurred by the defendant after the contract area was shut down, but the parties could not amicably resolve such dispute, as such, the matter was referred to the arbitral tribunal. In delivering the majority award, the arbitral tribunal found, inter alia, that: (a) the defendant's claim was not time-barred because the applicable limitation law to the parties' dispute was the Malaysian limitation law and not the Indian limitation law; (b) the defendant could charge certain specified costs and expenses to the JOA parties' joint account ('the costs chargeable to joint account decision'); (c) the defendant was entitled under article 4.10 of the JOA to be indemnified in relation to the amount awarded against it by an award in another arbitration involving the defendant and Samson Maritime Ltd ('the Samson award'); and (d) the parties to the arbitration shall undertake a reconciliation of their cash contributions made and the expenditures incurred as from 1 August 2011 ('the reconciliation order'). Aggrieved with such decision, the plaintiff filed originating summons ('the OS') to set aside the majority award, but the learned judicial commissioner ('the JC') had dismissed

the plaintiff's application, hence, the present appeal. In this appeal, in determining whether the JC was plainly wrong in arriving at her decisions, the court had to consider the following issues: (a) whether the decision of the arbitral tribunal in applying the Malaysian limitation law pursuant to article 17.12 of the JOA (because the seat of arbitration was Kuala Lumpur) instead of the Indian limitation law which was the parties' chosen law under article 18 of the JOA, was a decision that exceeded the tribunal's mandate scope of submission and jurisdiction, and thereby could be set aside under s 37(1)(a)(v) of the Arbitration Act 2005 ('the AA') ('the first issue'); (b) whether the decision of the arbitral tribunal in applying the Malaysian limitation law to the dispute instead of the parties' chosen substantive law, tantamount to a breach of fundamental principles of law and justice (in alleged contravention of ss 30(1) and 30(5) of the AA) and thereby could be set aside under s 37(1)(b)(ii) of the AA (on the grounds of public policy) ('the second issue'); and (c) whether the decisions of the arbitral tribunal in respect of costs chargeable to joint account, the Samson award and the reconciliation order (in the application of the Malaysian limitation law) were made against public policy or principle of international comity (in view of s 37(1)(b)(ii) as well as ss 30(1) and 30(5) of the AA) or had deprived the plaintiff of its rights to natural justice and rights to be heard (in view of s 37(2)(b) of the AA) ('the third issue').

Held, dismissing the appeal with costs, and affirming the JC's decision:

(1) With respect to the determination of the propriety of the JC's dismissal of the plaintiff's OS to set aside the majority award, it was trite law that the court ought not to descend from the bench and enter into the arbitral arena to disturb the arbitral tribunal's determinations and findings on merits (especially after the repeal of s 42 of the AA) (see para 36).

(2) The court took cognisance that s 37 of the AA was based on article 34 of the Model Law. In adopting the Model Law's provision, the Malaysian courts did not have the right to review the merits or correctness of an arbitral tribunal's decision. It ought to be acknowledged that the arbitral tribunal's decision was final and binding on the parties. On this score, any errors of law and fact made by the arbitral tribunal was not appealable. In such instance, the Malaysians courts did not and must not sit in appeal over the arbitral tribunal 's decision (see paras 47–48).

(3) Specific to arbitral awards involving time limitation issues, it was pertinent that the tests and deliberation be tied back down to the pure determination between what was procedural law and what was substantive law instead of embarking on a lengthy discourse on whether time limitation was a matter of admissibility or jurisdiction. This was in light of the unique or niche circumstance that time limitation could both be considered to be part of the decision-making process (as procedural law) which could be caught under s 37 of the AA, and also issue of law

and fact under s 42 of the AA. In relation to this, if the JC had found that time limitation was a procedural issue, then the JC must also remain consistent as to find that time limitation (as a procedure) was also an integral part of the decision-making process (which could fall within the ambit of s 37 of the AA). Thus, the court departed (albeit very slightly) from the learned JC's ratio decidendi that the arbitral tribunal's decision on time limitation (if indeed erroneous) could not fall within s 37 of the AA (see paras 66–67 & 69).

(4) In the present case, since time limitation was blind to the substance or merits of the case, it could not at all be said that time limitation was a matter of substantive law. In this sense, the court was in full agreement with the JC's finding that time limitation was a matter of procedural law (and not of substantive law). Thus, the applicable law of time limitation shall be the governing procedural law of the seat of arbitration (that being the Malaysian Law). Further, the court agreed with the JC's finding that estoppel applied to estop the plaintiff from denying that the proper curial law of limitation was Malaysian Law considering that the plaintiff itself had relied upon the Malaysian Limitation Act 1953 in the plaintiff's own attempt to prove that its counterclaims were not barred by limitation. Thus, there was no appealable errors within the conclusion of the JC's decision. Therefore, the court answered the first issue in the negative (see paras 68 & 73–75).

(5) The court answered the second issue in the negative. There was never any instance that the JC or the arbitral tribunal had unlawfully ignored or abandoned the parties' chosen governing substantive law of the dispute under s 30 of the AA. Instead, the majority award and the JC had simply applied the appropriate curial or procedural law (which also included the Malaysian law of time limitation). Thus, there was never any transgression against any of the subsections in s 30 of the AA, nor was there any instance of breach of fundamental law or undue preference of another substantive law aside from the chosen law which would be against public policy (see para 76).

(6) Since the JC's decision (and the arbitral tribunal's decision) in finding that the applicable limitation was the Malaysian law of limitation was sound in law, it could not at all be said that the JC (or the arbitral tribunal) had wrongfully allowed the defendant's claim in excess of the arbitral tribunal's mandate, scope of submission, and jurisdiction. There had not been any undue application of an improper procedural law that would lead the arbitral tribunal (and the learned JC) to award the defendant damages that would otherwise be time barred by the Indian law on time limitation. Thus, the JC was right to find that there could not have been any breach against public policy or the principle of

international comity by the arbitral tribunal. The court therefore answered the third issue in the negative (see para 77).

(7) Since the arbitral tribunal had correctly applied the Malaysian limitation law, the arbitral tribunal's decision-making process was legally sound. Anything else beyond that point were already encroaching into the realm of merit which should not be disturbed by the High Court. The propriety of the defendant's entitlement to the costs chargeable to joint account and the Samson Award (as well as the Reconciliation Order) was critically and extensively examined on its respective merits by the arbitral tribunal and thus, should not be ousted or disturbed by the court. Thus, the plaintiff's attempt to paint the arbitral tribunal's decision on merits as a breach of natural justice, an affront to public policy, and was in excess of its mandate, scope of arbitration, and jurisdiction by invoking ss 30, 37(1)(a)(iii), 37(1)(a)(v), 37(1)(b)(ii) and 37(2)(b) was plainly misconceived. Thus, the JC was correct to find that the plaintiff's complaints had also encroached into the realm of merits which were beyond the High Court's jurisdiction to re-examine on appeal (see para 81).

[Bahasa Malaysia summary

Melalui satu kontrak perkongsian pengeluaran ('PSC'), Kerajaan India telah memberikan kebenaran kepada plaintif, defendan dan dua syarikat lain ('pihak-pihak') untuk menjalankan cari gali petroleum di kawasan yang ditentukan ('kawasan kontrak tersebut'). Pihak-pihak kemudiannya memeterai perjanjian operasi bersama ('JOA') yang, antara lain, menyatakan bahawa perbelanjaan yang ditanggung oleh defendan sebagai pengendali untuk operasi petroleum harus dikongsi di antara pihak-pihak mengikut kadar kepentingan penyertaan masing-masing. Pertikaian timbul berhubung liabiliti pihak-pihak untuk perbelanjaan yang ditanggung oleh defendan selepas kawasan kontrak tersebut ditutup, tetapi pihak-pihak tidak dapat menyelesaikan pertikaian tersebut secara baik, oleh itu, perkara tersebut dirujuk kepada tribunal timbang tara. Dalam menyampaikan award majoriti, tribunal timbang tara mendapati, antara lain, bahawa: (a) tuntutan defendan tidak terhalang oleh had masa kerana undang-undang had masa yang terpakai kepada pertikaian pihak-pihak adalah undang-undang had masa Malaysia dan bukan undang-undang had masa India; (b) defendan boleh mengenakan kos dan perbelanjaan tertentu kepada akaun bersama pihak-pihak JOA ('keputusan bagi kos yang dikenakan kepada akaun bersama'); (c) defendan berhak di bawah perkara 4.10 JOA untuk di tanggung rugi berhubung dengan jumlah yang dikenakan terhadapnya oleh award dalam timbang tara lain yang melibatkan defendan dan Samson Maritime Ltd ('award Samson'); dan (d) pihak-pihak kepada timbang tara hendaklah melakukan penyelarasan bagi sumbangan tunai mereka yang dibuat dan perbelanjaan yang ditanggung mulai 1 Ogos 2011 ('perintah penyelarasan'). Terkilan dengan keputusan

A sedemikian, plaintif memfailkan saman pemula ('SP') untuk mengenepikan award majoriti, tetapi pesuruhjaya kehakiman yang bijaksana ('PK') telah menolak permohonan plaintif, justeru, rayuan semasa. Dalam rayuan ini, dalam menentukan sama ada PK adalah jelas salah dalam membuat keputusannya, mahkamah perlu mempertimbangkan isu-isu berikut: (a) sama
B ada keputusan tribunal timbang tara dalam menggunakan undang-undang had masa Malaysia menurut perkara 17.12 JOA (kerana tempat timbang tara dijalankan adalah di Kuala Lumpur) dan bukannya undang-undang had masa India yang merupakan undang-undang pilihan pihak-pihak di bawah perkara 18 JOA, adalah keputusan yang melebihi skop penyerahan dan bidang kuasa
C yang dimandatkan kepada tribunal, dan dengan itu boleh diketepikan di bawah s 37(1)(a)(v) Akta Timbang Tara 2005 ('AT') ('isu pertama'); (b) sama ada keputusan tribunal timbang tara dalam menggunakan undang-undang had masa Malaysia kepada pertikaian tersebut dan bukannya undang-undang
D substantif pilihan pihak-pihak, terjumlah kepada pelanggaran prinsip asas undang-undang dan keadilan (yang didakwa melanggar ss 30(1) dan 30(5) AT) dan dengan itu boleh diketepikan di bawah s 37(1)(b)(ii) AT (atas alasan dasar awam) ('isu kedua'); dan (c) sama ada keputusan tribunal timbang tara berkenaan dengan kos yang dikenakan kepada akaun bersama, award Samson
E dan perintah penyelarasan (dalam pemakaian undang-undang had masa Malaysia) telah dibuat bertentangan dengan dasar awam atau prinsip 'international comity' (berdasarkan s 37(1)(b)(ii) serta ss 30(1) dan 30(5) AT) atau telah menafikan hak plaintif ke atas keadilan semula jadi dan hak untuk didengar (berdasarkan s 37(2)(b) AT) ('isu ketiga').

F

Diputuskan, menolak rayuan dengan kos dan mengesahkan keputusan PK:

(1) Berkenaan dengan penentuan kewajaran penolakan oleh PK terhadap SP plaintif untuk mengenepikan award majoriti, adalah menjadi
G undang-undang yang mantap bahawa mahkamah tidak sepatutnya turun dari kerusi hakim dan masuk ke arena timbang tara untuk mengganggu penentuan dan dapatan-dapatan tribunal timbang tara berkenaan dengan merit (terutamanya selepas pemansuhan s 42 AT) (lihat perenggan 36).

H (2) Mahkamah mengambil perhatian bahawa s 37 AT adalah berdasarkan perkara 34 'Model Law'. Dalam menerima pakai peruntukan 'Model Law', Mahkamah Malaysia tidak mempunyai hak untuk menyemak merit atau ketepatan keputusan tribunal timbang tara. Perlu diakui bahawa keputusan tribunal timbang tara adalah muktamad dan
I mengikat pihak-pihak. Berkaitan dengan ini, apa-apa kekhilafan undang-undang dan fakta yang dibuat oleh tribunal timbang tara tidak boleh dirayu. Dalam keadaan sedemikian, mahkamah Malaysia tidak dan tidak boleh mendengar rayuan terhadap keputusan tribunal timbang tara (lihat perenggan 47–48).

(3) Khusus bagi award timbang tara yang melibatkan isu had masa, adalah penting bahawa ujian dan pertimbangan dihadkan hanya kepada penentuan antara apa yang merupakan undang-undang prosedur dan apa yang merupakan undang-undang substantif dan bukannya memulakan perbincangan yang panjang mengenai sama ada had masa adalah satu perkara kebolehterimaan atau bidang kuasa. Ini adalah berdasarkan keadaan unik atau khusus bahawa pengehadan masa boleh dianggap sebagai sebahagian daripada proses membuat keputusan (sebagai undang-undang prosedur) yang boleh termasuk di bawah s 37 AT, dan juga isu undang-undang dan fakta di bawah s 42 AT. Sehubungan dengan ini, jika PK mendapati bahawa had masa adalah isu prosedur, maka PK juga perlu kekal konsisten dengan memutuskan bahawa had masa (sebagai prosedur) juga merupakan bahagian penting dalam proses membuat keputusan (yang boleh termasuk dalam lingkungan s 37 AT). Oleh itu, mahkamah menyimpang (walaupun dengan sangat sedikit) daripada ratio decidendi PK yang bijaksana yang memutuskan bahawa keputusan tribunal timbang tara mengenai had masa (jika memang salah) tidak boleh termasuk dalam s 37 AT (lihat perenggan 66–67 & 69).

(4) Dalam kes ini, oleh kerana had masa tidak berkaitan dengan substantif atau merit kes tersebut, ia tidak boleh sama sekali dikatakan bahawa had masa adalah perkara undang-undang substantif. Dalam pengertian ini, mahkamah bersetuju sepenuhnya dengan dapatan PK bahawa had masa adalah persoalan undang-undang prosedur (dan bukan undang-undang substantif). Oleh itu, undang-undang had masa yang terpakai hendaklah undang-undang prosedur yang mengawal kerusi timbang tara (iaitu undang-undang Malaysia). Selanjutnya, mahkamah bersetuju dengan dapatan PK bahawa estoppel terpakai untuk menghalang plaintif daripada menafikan bahawa undang-undang had masa kurial yang betul adalah Undang-undang Malaysia memandangkan plaintif sendiri telah bergantung kepada Akta Had Masa 1953 Malaysia dalam percubaan plaintif sendiri untuk membuktikan bahawa tuntutan balasnya tidak dihalang oleh had masa. Oleh yang demikian, tiada kekhilafan yang mewajarkan rayuan dalam kesimpulan keputusan PK. Oleh itu, mahkamah menjawab isu pertama secara negatif (lihat perenggan 68 & 73–75).

(5) Mahkamah menjawab isu kedua secara negatif. Tidak ada apa-apa keadaan yang menunjukkan PK atau tribunal timbang tara telah menyalahi undang-undang atau mengabaikan undang-undang substantif pilihan pihak-pihak yang mengawal pertikaian di bawah s 30 AT. Sebaliknya, award majoriti dan PK hanya mengguna pakai undang-undang kurial atau prosedur yang sesuai (yang juga termasuk undang-undang had masa Malaysia). Oleh itu, tidak pernah ada apa-apa pelanggaran terhadap mana-mana subseksyen dalam s 30 AT, dan tidak

ada apa-apa keadaan pelanggaran undang-undang asas atau kecenderungan yang tidak wajar terhadap undang-undang substantif lain selain daripada undang-undang yang dipilih yang akan bertentangan dengan dasar awam (lihat perenggan 76).

(6) Memandangkan keputusan PK (dan keputusan tribunal timbang tara) dalam mendapati bahawa had masa yang terpakai ialah undang-undang had masa Malaysia adalah tepat di sisi undang-undang, maka tidak boleh sama sekali dikatakan bahawa PK (atau tribunal timbang tara) telah membenarkan secara salah tuntutan defendan melebihi mandat tribunal timbang tara, skop penyerahan dan bidang kuasa. Tidak ada apa-apa pemakaian yang tidak wajar bagi undang-undang prosedur yang tidak tepat yang akan menyebabkan tribunal timbang tara (dan PK yang bijaksana) untuk memberikan ganti rugi kepada defendan yang sebaliknya akan dihalang oleh had masa di bawah undang-undang had masa India. Oleh itu, PK adalah betul dalam mendapati bahawa tidak mungkin terdapat apa-apa pelanggaran terhadap dasar awam atau prinsip 'international comity' oleh tribunal timbang tara. Oleh itu mahkamah menjawab isu ketiga secara negatif (lihat perenggan 77).

(7) Memandangkan tribunal timbang tara telah mengguna pakai undang-undang had masa Malaysia dengan betul, maka proses membuat keputusan oleh tribunal timbang tara adalah betul menurut undang-undang. Apa-apa yang selain itu telah menceroboh bidang merit yang tidak sepatutnya diganggu oleh Mahkamah Tinggi. Kewajaran hak defendan untuk mendapat kos yang dikenakan kepada akaun bersama dan Award Samson (serta perintah penyelarasan) telah dikaji secara kritis dan meluas mengenai meritnya masing-masing oleh tribunal timbang tara dan oleh itu, tidak boleh diketepikan atau diganggu oleh mahkamah. Oleh itu, percubaan plaintif untuk menggambarkan keputusan tribunal timbang tara mengenai merit kes sebagai pelanggaran keadilan semula jadi, penghinaan kepada dasar awam, dan telah melebihi mandat, skop timbang tara dan bidang kuasanya dengan mengguna pakai ss 30, 37(1)(a)(iii), 37(1)(a)(v), 37(1)(b)(ii) dan 37(2)(b) adalah jelas salah sangka. Oleh itu, PK adalah betul apabila mendapati bahawa aduan plaintif juga telah menceroboh bidang merit yang berada di luar bidang kuasa Mahkamah Tinggi untuk pemeriksaan semula semasa rayuan (lihat perenggan 81).]

Cases referred to

BBA and others v BAZ and another appeal [2020] SGCA 53, CA (not folld)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor [2019] 2 MLJ 413; [2019] 1 CLJ 1, FC (refd)

Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198, FC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1; [2020] 1 LNS 1060, FC (refd)
Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd & another case [2016] 4 CLJ 927, HC (refd)
Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177; [2018] 2 CLJ 641, FC (refd)
The Government of India v Cairn Energy India Pty Ltd & Ors [2014] 9 MLJ 149, HC (refd)
UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2010] MLJU 2225; [2010] 9 CLJ 785, FC (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 30, 30(1), (2), (5), 36(1), 37, 37(1), (1)(a)(iii), (1)(a)(iv), (1)(a)(v), (1)(b)(ii), (2)(b), 42
Limitation Act 1953
Limitation Act 1963 [IN] s 3

Appeal from: *Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc* [2023] 7 MLJ 415 (High Court, Kuala Lumpur)

Ooi Huey Miin (with Dianne Hong Sze Wei) (Raja, Darryl & Loh) for the appellant.
Avinash Vinayak Pradhan (with Rubini a/l Murugesan, Arthur Ng Wei Meng and Nur Fathin Amira bt Sapawi) (Christopher & Lee Ong) for the respondent.

Azimah Omar JCA:

INTRODUCTION

[1] The appeal before us concerns an arbitral award. The plaintiff who was unsuccessful in its attempt to set aside an award handed down by an arbitral body in a majority decision ('majority award') had appealed against the High Court's decision dated 11 February 2022. The High Court had dismissed the plaintiff's originating summons to set aside the majority award dated 28 February 2020 ('plaintiff's OS') with costs of RM 30,000.

FACTUAL BACKGROUND

[2] For better understanding of the matter at hand, it is necessary to set out the facts of the case that has led to the majority award. The parties will be referred to as they were at the High Court.

A **[3]** The plaintiff in this appeal is a company by the name of Hindustani Oil Exploration Company ('HOEC'). The defendant is an Indian company known as Hardy Exploration & Production (India) Inc ('HEPI').

B **[4]** The plaintiff, the defendant and two other companies by the name of Tata Petrodyne Ltd ('TPL') and Oil & Natural Gas Corp Ltd ('ONGC') were parties to a joint operating agreement ('JOA') dated 5 December 1995. In other words, these four companies are collectively, 'the parties' in relation to the said JOA.

C **[5]** The JOA was an agreement entered into pursuant to the express requirements of a production sharing contract dated 31 December 1994 ('PSC') between the parties and the Government of India.

D **[6]** Pursuant to the PSC, the Government of India as owner of the petroleum resources in the Cauvery Basin, offshore India (specifically identified as Block CY-OS-90/1) ('contract area') granted permission to the parties to conduct 'petroleum operations' in the contract area, with ONGC being the petroleum exploration license holder.

E **[7]** The JOA was subsequently modified by an addendum agreement dated 19 April 1999.

F **[8]** By the operation of the JOA and the PSC, the parties collectively constituted the 'contractor' who were responsible for 'Petroleum Operations' within the contract area.

[9] Under article 6.5 of the PSC, amongst the members of the contractor,
G the defendant (HEPI) assumed the role of 'operator' for Petroleum Operations and was responsible for the performance of the operating functions of the contractor.

H **[10]** The JOA regulates the rights and responsibilities of the parties including the expenditures incurred by the defendant (in its capacity as the operator) towards operations conducted in the contract area (which is required to be shared among the parties in proportion to their respective 'participating interests' in the JOA).

I **[11]** Article 7.1 of the JOA prescribed that all costs and expenses incurred by the operator ie HEPI on behalf of the contractor in carrying out the joint operations under the JOA shall be borne and paid by the members of the contractor in proportion to their 'participating interests' and shall be

determined and/or allocated in accordance with the 'JOA accounting procedure'. At the material time, the 'participating interests' of each member was as follows:

ONGC — 40%, HOEC — 21%, TPL — 21% and HEPI — 18%.

[12] The contract area was in production from about 27 June 1997 until about 30 July 2011. In other words, by the year 2011 the contract area was shut down.

[13] After the contract area was shut down, the defendant claimed that there were expenses incurred and continued to be incurred by the defendant in the performance of its obligations under the PSC and the JOA and therefore, ONGC, the plaintiff and TPL were bound under the JOA to pay their respective shares towards such expenses, in accordance with their participating interests.

[14] A dispute arose with respect to the parties' liability for such expenses. However, the dispute could not be resolved amicably by the parties as envisaged under article 17.1 of the JOA. In the event of the unresolved dispute between the parties (contractors), the JOA prescribes as follows:

(a) article 17.3 — Unresolved Disputes:

> Subject to the provisions of this agreement, the parties hereby agree that any matters unresolved, disputes, differences or claims which cannot be settled amicably within 21 days, may be submitted to a sole expert where article 17.2 applies or otherwise to an arbitral tribunal for final decision as hereinafter provided;

(b) article 17.12 — Venue:

> The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the parties shall continue to implement the terms of this agreement notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of article 18, the arbitration agreement contained in this article 17 shall be governed by the laws of England; and

(c) article 18.1 — Indian law to Govern:

> Subject to article 17, this agreement shall be governed by and interpreted in accordance with the Laws of India.

[15] The parties' disputes were submitted to arbitration before a tribunal which comprised of three arbitrators; (i) the late Mr Vinayak Pradhan

(nominated by the defendant), (ii) Justice GS Singhvi (Rtd) from India (nominated by ONGC), the plaintiff and TPL, and (iii) Professor Lawrence Boo from Singapore (who was appointed as the third and presiding arbitrator by Justice GS Singhvi (Rtd)) and the late Mr Vinayak Pradhan ('tribunal/arbitral tribunal').

[16] A memorandum of issues dated 2 April 2018 which comprised of 22 issues was settled by the tribunal.

[17] The majority of the tribunal, consisting of Professor Lawrence Boo and the late Mr Vinayak Pradhan issued the majority award and found that there were amounts due to be paid to the defendant (and also separately directed that the parties undertake a reconciliation exercise to examine the veracity of certain cash contributions and expenditures).

[18] The tribunal reserved the jurisdiction to consider any ancillary matter arising out of or following the account reconciliation and make a further award if it deemed necessary. This is referred to in the OS as the 'reconciliation of the 'joint account'.

[19] The dissenting Award by Justice GS Singhvi (Rtd) however dismissed the claim on the basis of time bar; and that the defendant was guilty of 'Gross Negligence' and 'Wilful Misconduct' which disentitled it from claiming an indemnity under article 4.10(ii) of the JOA.

BEFORE THE HIGH COURT

[20] In its attempt to set aside the majority award, the plaintiff had advanced the following contentions before the learned judicial commissioner (now High Court judge):

(a) the majority of the tribunal decided Malaysian limitation laws and not Indian limitations laws applied to the dispute and found that no part of the defendant's claims was time barred ('applicable limitation laws decision');

(b) the majority of the tribunal in determining that the defendant could charge certain specified costs and expenses to the JOA parties' joint account acted in excess of jurisdiction, rewrote the contract, and exceeded its mandate ('costs chargeable to joint account decision');

(c) the majority of the tribunal in making decisions that the defendant was entitled under article 4.10 of the JOA to be 'indemnified' amounts awarded against it by an award in another arbitration involving the defendant and a vessel charterer, Samson Maritime Ltd ('the Samson award') and the JOA parties' liabilities, vis a vis one another acted in

excess of jurisdiction ('Samson award decision'); and

(d) the directions of the majority of the tribunal that the parties to the arbitration shall undertake a reconciliation of their cash contributions made and the expenditures incurred as from 1 August 2011 is 'contrary to the public policy of Malaysia and was made in breach of natural justice' ('reconciliation decision').

The plaintiff's submission

Contention (i)

[21] It was submitted on behalf of the plaintiff that the majority of the tribunal had incorrectly interpreted article 17 and article 18 of the JOA when they decided that the applicable limitation law applicable in deciding the dispute between the parties was the Malaysian limitation laws. According to the counsel for the plaintiff, the decision of the majority of the tribunal is totally erroneous when they had not decided the issue of limitation in accordance with the Indian limitation laws (on the ground that article 18.1 of the JOA has expressly provided that the parties' chosen of law to govern the agreement (the JOA) would be the Laws of India.

[22] It was further submitted by the counsel for the plaintiff that the majority of the tribunal had fallen into error when it found that whether limitation applies would be a matter for consideration at the seat of the arbitration (ie Kuala Lumpur) and therefore, the issue of limitation is a matter of procedural law. Whereas under Indian law, time limitation would be considered as a matter of substantive rights and not procedural law.

[23] Based on the above arguments, the counsel for the plaintiff argued that in applying Malaysian limitation laws to the exclusion of Indian limitation laws, the majority of the tribunal has acted in excess of its mandate and exceeded the scope of submission under s 37(1)(a)(v) of the Arbitration Act 2005 ('the AA 2005') (and has acted in contrary of public policy under s 37(1)(b)(ii) of the AA 2005).

[24] The plaintiff also argued that the application of the Malaysian limitation laws by the majority of the tribunal had contravened the mandatory provisions of ss 30(1), 30(2) and 30(5) of the AA 2005 as these provisions have envisaged as follows:

(a) s 30(1) that the arbitral tribunal shall decide the dispute in accordance with such rules of law chosen by the parties; and

(b) s 30(2) any designation by the parties of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring

A to the substantive law of that State and not to its conflict of laws rules, and s 30(5) that the arbitral tribunal shall, in all cases, decide in accordance with the terms of the agreement.

B **[25]** It was also the argument of the plaintiff that (when the majority of the tribunal had applied the Malaysian limitation laws) it had decided on claims that would have been time barred under the Indian limitation laws. On this argument, the counsel for the plaintiff had relied on a recent Singapore case of *BBA and others v BAZ and another appeal* [2020] SGCA 53.

C Contention (ii) and Contention (iii)

Decisions on costs chargeable to joint account decision and the Samson award decision

D **[26]** It was the contention of the plaintiff that the tribunal's decision in finding that the defendant's claim is not time-barred under Malaysian law had a material impact on the other parts of the award (considering the fact that a large portion of the defendant's claims for costs to joint account were for E expenses allegedly incurred more than three years before commencement of the arbitration on 17 March 2017) which would have been time barred under the Indian law on limitation.

F **[27]** Regarding the Samson award claims, the plaintiff contended that these claims were also claims which ought to be time barred had the limitation under the Indian Limitation Act 1963 be applied (as these claims relate to charter hire up to 31 December 2012).

G **[28]** The plaintiff further contended that article II of Appendix A to the JOA did not create a distinct and separate class of expenditure that enabled the defendant to recover the costs charged by the defendant to the joint account for joint operations (if such costs were not incurred in accordance with an annual work programme and budget approved by the Management Committee). It H was argued by the plaintiff that when the majority of the tribunal awarded the defendant the costs chargeable to joint account, the majority of the tribunal had incorrectly interpreted Article 4.8 and article II of Appendix A to the JOA and thereby re-wrote the JOA by adding additional term. By doing so, the majority of the tribunal is said to have exceeded the limits of their I mandate/authority. This according to the plaintiff, the majority of the tribunal had made decision beyond the scope of the submission under s 37(1)(a)(v) of the AA 2005. But it is sublimely obvious to us even at this early juncture, that this is a clear contention on merits of the arbitral tribunal's decision.

[29] Likewise, as against the Samson award claims (where the majority of the tribunal had awarded the defendant under this head on the ground that the other 'contractors' are liable separately to indemnify the defendant the Samson award under the indemnity provisions of article 4.10 of the JOA) the plaintiff also argued that the tribunal had exceeded the limits of their mandate or authority.

Contention (iv) — Reconciliation order

[30] The plaintiff contended that the majority of the tribunal had incorrectly ordered or directed the parties to the arbitration to undertake a reconciliation of their cash contributions made and the expenditures incurred from 1 August 2011. The plaintiff's complaint against this reconciliation order is that; the plaintiff was supposedly not 'forewarned' of the possibility of the issuance of a reconciliation order (and therefore the plaintiff was allegedly not given the opportunity to address the same to the majority of the tribunal). It is therefore the contention of the plaintiff that the reconciliation order by the majority of the tribunal is 'contrary to the public policy of Malaysia' and was issued in breach of natural justice.

The defendant's submission

[31] The defendant had vigorously opposed the plaintiff's OS. The defendant firmly stood on the position that the grounds advanced by the plaintiff to set aside the majority award are without basis in that the complaints have nothing to do with the process of the arbitration, or with the jurisdiction of the tribunal. Instead, the OS was an unlawful attempt to appeal against the merits and substance of majority award by inviting the court to re-open and rehear the merits of the issues that were already considered and determined by the majority of the tribunal while acting within its jurisdiction.

THE HIGH COURT'S FINDINGS

[32] The learned judicial commissioner (now High Court judge) had made the following findings:

In respect of contention (i)

(a) bearing in mind curial intervention is circumscribed by s 36(1) of the AA 2005 on the finality of awards and s 8 of the AA 2005 which provides that 'No court shall intervene in matters governed by this Act, except where so provided in this Act', the threshold to set aside an arbitral award is high. The plaintiff has not satisfied the threshold;

(b) whether Malaysian laws of limitation or Indian laws of limitation apply is a matter for the tribunal to rule on (as contained in the amended MOI) and therefore the majority of the tribunal cannot be said to have exceeded or transgressed the scope of the mandate referred to them;

(c) the matters raised by the plaintiff before the High Court is an attempt to relitigate the issue already argued before the tribunal. Even if assuming for one moment the majority tribunal erroneously interpreted article 17 and 18 of the JOA to apply Malaysian laws of limitation, the High Court has no jurisdiction to substitute its own interpretation of the law and facts for the simple reason that application for setting aside purportedly founded on an erroneous interpretation of law and fact does not fall within the purview of s 37(1)(a)(iv) and (v) of the AA 2005;

(d) the plaintiff's argument that the decision of the majority of the tribunal constitutes a breach of Malaysia's public policy is ill-conceived and the plaintiff had failed to fulfil the high threshold to prove a case of an affront to public policy;

(e) the very fact that the plaintiff in the arbitration did not object to the Malaysian Limitation Act 1953 being the limitation law applicable to the defendant's claims on the basis that they were part of the procedural law that followed the *lex arbitri* (and the plaintiff having also relied on the Malaysian Limitation Act 1953 to contend that its counterclaims in the arbitration were not time-barred) puts the plaintiff 'beyond the point of no- return' on the tribunal's decision that Malaysian limitation laws shall apply. Such an objection raised in the instant OS is simply too late in the day. To find otherwise will effectively give the plaintiff a second bite of the proverbial cherry. Not only that, estoppel also applies. The plaintiff simply cannot approbate and reprobate;

(f) the construction of the JOA in this case is a question of law and fact to be determined by the tribunal, and it is not for the parties or their counsel to say what the documents say or mean; and

(g) as the construction of the JOA is within the remit of the tribunal, even if the majority of the tribunal had wrongly interpreted the JOA, it does not bring the matter within s 37 of the AA 2005 as the High Court is not entitled to substitute tribunal's interpretation of the JOA with the High Court's own interpretation of the JOA.

In respect of Contention (ii) and Contention (ii):

(a) the challenge by the plaintiff against the majority of the tribunal's decisions in respect of the costs chargeable to joint account and Samson award claims are in substance, an appeal on the merits of the majority award. Attacking the merits has no nexus with s 37 of the AA 2005 and is only permissible under s 42 of the AA 2005 (which was repealed in

2018). The amendment brought Malaysia to be in tandem with other jurisdictions which do not permit referrals to court on a question of law arising from an award;

(b) even if the tribunal's interpretation of the JOA is in error, such an error in interpretation does not at all fall within the ambit of s 37 of the AA 2005. Neither does the High Court sit as an appellate court to review the merits of the arbitral award.

In respect of Contention (iv) — reconciliation decision:

(a) considering that the majority of the tribunal had expressly stated that it would hear the parties to the arbitration further if parties were unable to reach agreement, it is plainly obvious that this issue is still very much a live issue. Therefore, the plaintiff will have every opportunity to present its case. Thus, the court did not see how the plaintiff can be said to be seriously or materially impacted or was deprived of its rights (in natural justice) to be heard. The plaintiff ultimately failed to prove that the arbitral award was 'contrary to the public policy of Malaysia or was made in breach of natural justice under ss 37(1)(a)(iii), 37(1)(b)(ii) and 37(2)(b) of the AA 2005;

(b) further, the plaintiff has to show that its complaints come within s 37 of the AA 2005. Stare decisis demands that the court observes the decision of the Federal Court in *Sigur Rus* which went on to state that the court's discretion to set aside an award under s 37(1) must be exercised with regard to the policies and objectives underpinning the AA 2005 and even if there is a breach of natural justice, setting aside is not automatic; and

(c) the whole core and sinew of the plaintiff's complaints are not contemplated by s 37 of the AA 2005.

[33] In brief, the learned judicial commissioner held that the matters that were dealt with in the majority award were matters well within the domain of the tribunal's jurisdiction to determine (and thus, they cannot be leveraged as grounds to set aside the majority award). Even if the plaintiff was successful to prove breach of public policy or natural justice (during the arbitral proceedings or in connection with the majority award) the High Court nevertheless has a discretion not to set aside an award under s 37(1) of the AA 2005.

THE APPEAL BEFORE US

[34] The plaintiff in its memorandum of appeal has impugned the judicial commissioner's findings on the following grounds:

(a) that the learned JC had come to the wrong conclusion in not setting aside the majority award for reasons set out in the plaintiff's OS;

(b) the learned JC had erred in law and/or fact in finding that the plaintiff's challenges to the award were an attempt at an appeal against the merit of the award (as opposed to a legitimate challenge on the specific and limited grounds provided for under the Arbitration Act 2005);

(c) the learned JC, in making the aforesaid findings did not consider or sufficiently consider the proper ambit of the arbitration agreement from which the tribunal derived its jurisdiction and/or mandate and the proper scope of submission to arbitration;

(d) the learned JC had incorrectly applied the law to the facts of the case, if she correctly did so; she ought to have found that the majority arbitral tribunal had contravened ss 30(1), 30(5), 37(1)(a)(v), 37(1)(b)(ii) and 37(2)(b) of the Arbitration Act 2005 and that such contraventions materially impacted the award; and

(e) the learned JC had incorrectly applied the law to the facts of the case, if she had correctly did so, she ought to have allowed the plaintiff's setting aside application in the High Court with costs.

[35] The threshold of the appellate intervention has been explicitly set out in a plethora of cases. Suffice to mention a few:

(a) *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC):

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established *plainly wrong test*.

(b) *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1; [2020] 1 LNS 1060 (FC):

> [33] It was a long settled principle, stated and restated in domestic and wider

common law jurisprudence, that *an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong*. (The Supreme Court of United Kingdom in *McGraddie v McGraddie* [2013] WLR 2477).

[34] The 'plainly wrong' test operates on the principle that the trial court has had the advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that acts on the printed records. The test was pioneered by the House of Lords in *Clarke v Edinburgh Tramways Co* [1919] SC (HL) 35, when it adjudicated on the ability of an appellate court to reconsider the facts of a particular case, when there is already findings of fact by the lower court. In this regard, Lord Shaw's judgment is pertinent when His Lordship said:

...

When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of Justice. In Courts of Justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I,who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case-in a position, not having those privileges, to come to clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment. (Emphasis added.)

[148] Given the aforesaid, we form the view that rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the 'plainly wrong' test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

(c) *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] MLJU 2225; [2010] 9 CLJ 785 (FC):

> [26] Thus, the prime issue in respect of questions 1 to 3 is whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge. *It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence.* (See *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; [1978] 1 LNS 32 *Watt or Thomas v Thomas* [1947] AC 484 and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309).
>
> [27] In the instant case, as found by the trial judge, that the case of UEM and GIE was not one that was premised only on documentary evidence. The positions of the respective parties depended largely on oral evidence as to the circumstances of the dispute between the parties as well as the circumstances underlying material documentary evidence. In respect of documentary evidence, it was not entirely such that it could be understood without the benefit of explanation by material witnesses.
>
> [28] It is for this reason that the trial judge's conclusion that Seow, the only witness put forth by GIE, being not a witness of truth, was of great significance. This is because GIE's case was mounted on the strength of Seow's evidence. Reliance was placed on Seow as to how documents were to be understood. Several affidavits were filed by Seow in the proceedings which were then relied upon on Seow's evidence in chief for the trial of both the petitions. Thus, what the trial judge had to say of Seow as a witness is crucial ...

(d) *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177; [2018] 2 CLJ 641 (FC):

> [94] The law is clear and well-settled in that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] MLJU 2225; [2010] 9 CLJ 785, In *Re B (a child) (care order: proportionality: criterion for review)* [2013] 1 WLR 1911 and *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453). This court has said this before, and we adhere to it now. Having regard to the above principle, we find that in the present case the Court of Appeal made no findings that the High Court had gone plainly wrong, let alone that on a reconsideration of the whole evidence the opposite conclusion should be reached.
>
> [95] In *McGraddie v McGraddie* [2013] WLR 2477, the United Kingdom Supreme Court held that an appellate court should not interfere with the trial court's conclusions on primary facts unless it was satisfied that the court was plainly wrong; that the reasons justifying that approach were not limited to

> the fact that the trial judge was in a privileged position to assess the credibility of witnesses' evidence, but also included the fact that trial judges possessed expertise in determining issues of fact, that duplication of the trial judge's efforts on appeal was undesirable.
>
> [96] In *McGraddie*, the Supreme Court referred to the judgment of the majority of the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235, which explained why appellate courts are not in a favourable position to assess and determine factual matters: 'appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole'.
>
> [97] Recently in *Henderson v Foxworth Investments Ltd and Another* [2014] 1 WLR 2600, the United Kingdom Supreme Court held that in the absence of some other identifiable error, such as a material error of law or the making of a critical factual finding which had no basis in the evidence, an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached; and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[36] And specific to the determination of the propriety of the learned JC's dismissal of the plaintiff's OS to set aside the majority award, it is trite law that the court ought not to descend from the bench and enter into the arbitral arena to disturb the arbitral tribunal's determinations and findings on merits (especially after the repeal of s 42 of the AA 2005). We derive much wisdom from Mary Lim J's (as Her Ladyship then was) decision in *The Government of India v Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 149 in which had astutely found the following:

> The court's powers here are specifically enacted under statute. *Since the court does not sit in appellate capacity, the court does not scrutinise the merits of the parties' respective case or responses before the arbitral tribunal.* The court must also resist interfering in the decisions of the arbitral tribunal save where it is prescribed under the Arbitration Act 2005.
>
> [172] Quite aside from this, *there is the principle which has remained constant*, be it under the old Arbitration Act of 1952 or the new 2005 Act; and that is in the fundamental approach that courts generally bear when dealing with challenges of arbitral awards. *Not only are courts slow to intervene even where there is discretion to do so, the courts are cognisant of the fact that as supervisory courts, there is a more than healthy respect for party autonomy and party choice.* The courts here have long ascribed to this philosophy practiced in many jurisdictions.

A THE COURT'S ANALYSIS

[37] We observed that the plaintiff had set out five primary grounds in challenging the learned judicial commissioner's findings. However, upon close scrutiny of the cause papers filed herein, and also the submissions by the parties (both oral and written), we identified that the plaintiff is essentially impugning the judicial commissioner's findings on two chief contentions: First, the plaintiff contends that the learned judicial commissioner had erred in her decision when she found that the grounds or the complaints raised by the plaintiff did not satisfy the threshold for the exercise of discretion of the High Court under s 37 of the AA 2005 to set aside the majority award.

[38] Secondly; the plaintiff contends that the learned JC has gravely erred when the learned JC found that the arbitral tribunal's decision (as to costs chargeable to joint account, Samson award claims and reconciliation order) were all matters which were well within the domain of the tribunal (and was not in excess of the tribunal's mandates, scope of submission and jurisdiction).

[39] At the appeal stage before us, we then must pose this question, was the learned judicial commissioner plainly wrong (in arriving at her findings) to warrant our appellate intervention?

[40] In order to determine whether the learned judicial commissioner was plainly wrong in arriving at her decisions, we shall delve into our deliberations by gradually determining the following three issues in the following sequence:

Issue No (i)

Whether the decision of the majority of the tribunal (in applying the Malaysian limitation law (as the seat of arbitration is Kuala Lumpur — article 17.12 of the JOA) instead of the Indian limitation laws (as prescribed by article 18 of the JOA — chosen law of the parties) was a decision that exceeded the tribunal's mandate scope of submission and jurisdiction, and thereby can be set aside under s 37(1)(a)(v) of the AA 2005.

Issue No (ii)

Whether the decision of the majority of the tribunal in applying the Malaysian limitation laws to the dispute instead of the parties' chosen substantive law, tantamount to a breach of fundamental principles of law and justice (in alleged contravention of ss 30(1) and 30(5) of the AA 2005) and thereby can be set aside under s 37(1)(b)(ii) of the AA 2005 (on the grounds of public policy).

Issue No (iii)

Whether the decisions of the majority of the tribunal in respect of costs chargeable to joint account, the Samson award and the reconciliation order (in the application of the Malaysian limitation law) were made against public policy or principle of international comity (in view of s 37(1)(b)(ii) as well as ss 30(1) and 30(5) of the AA 2005 (or had deprived the plaintiff of its rights to natural justice and rights to be heard (in view of s 37(2)(b) of the AA 2005)).

Issue No (i)

[41] The plaintiff case is simply this. The plaintiff sought to set aside the majority award allowing the defendant to claim expenses against the plaintiff and two other parties (as contractors under the JOA) incurred by the defendant arising from the JOA and the PSC.

[42] The plaintiff had disputed the defendant's claims on the ground that a large part of the defendant's claims was for expenses incurred more than three years before the commencement of the arbitration (on 17 March 2017) which according to the plaintiff ought to be time barred under the Indian limitation laws (s 3 of the Indian Limitation Act 1963).

[43] Despite the fact that article 18 of the JOA has spelt out that Indian law shall govern the JOA, the majority of the tribunal had decided that the Malaysian limitation laws was applicable to this dispute as the seat of arbitration is in Kuala Lumpur (and thus, the defendant's claims were not time barred).

[44] Clearly here, the complaint raised by the plaintiff is that; the majority of the tribunal was incorrect when deciding that limitation laws are procedural laws and (since limitation laws are procedural in nature) therefore the applicable limitation law to the dispute shall be the law of country where the seat of arbitration is, being Kuala Lumpur, Malaysia (as prescribed under article 17.12 of the JOA). The plaintiff stood on the position that limitation laws are substantive rights and therefore it must be construed in accordance to the law chosen by the JOA's parties ie the Indian limitation law.

[45] Having applied the Malaysian limitation laws to this dispute, the majority of the tribunal was alleged to have gone in excess of its jurisdiction, scope of submission or its mandate.

[46] To supplement the plaintiffs purported grounds of challenge, the plaintiff had primarily relied on ss 37(1)(a)(iii), 37(1)(a)(v), 37(1)(b)(ii), 37(2)(b), 30(1) and 30(2) of the AA 2005.

[47] This court takes cognisance that s 37 of the AA 2005 is based on article

34 of the Model Law. In adopting the Model Law's provision, the Malaysian courts do not have the right to review the merits or correctness of an arbitral tribunal's decision.

[48] It must also be acknowledged that the arbitral tribunal's decision is final and binding on the parties. On this score, any errors of law and fact made by the arbitral tribunal is not appealable. In such instance, the Malaysians courts do not and must not sit in appeal over the arbitral tribunal 's decision.

[49] By and large, the glaring dissonance that riled the appellant were these findings by the learned judicial commissioner:

(a) on the Singaporean authority of *BBA v BAZ*, the learned HC judge had found that the determination of the relevant limitation period was a *matter of admissibility and not of jurisdiction* then; and

(b) thus, the dissonance arose in that, if time limitation is not a matter of curial or procedural law (as in a jurisdictional issue) then it would seem that time limitation must be the inverse of curial law (as in substantive law).

[50] Considering the mystifying dissonance, it is only prudent for this court to mind itself of the true essence of the arguments put forth before this court (and divorce itself from unnecessary 'labels' to the issue that would only serve to convolute the matter unnecessarily). Thus, it is entirely unhelpful to this court to try and 'accommodate' or embed the word 'jurisdiction' (as relied upon by the plaintiff vide s 37(a)(v) of the AA 2005) atop of the plain and simple issue of *lex arbitri* (between what is curial or procedural law of the arbitration as opposed to substantive law of the dispute).

[51] The plaintiff harped on 'excess of jurisdiction' ad nauseam as if to impress to this court that it is the plaintiff's 'means' to prove the error of the majority decision (when in reality, the finding of excess of jurisdiction is purely the 'end' in which the plaintiff is trying to achieve under s 37(a)(v) of the AA 2005). This much is clear as neither ss 30(1), 30(2) nor s 30(5) of the AA 2005 can by themselves be leveraged as grounds for the court to interfere with an arbitral award. Hence the reason the plaintiff posited the collective reading of these subsections to be read in tandem with s 37(a)(v) of the AA 2005.

[52] (As an aside) on the proper reading of the said provisions, we find some correctness (albeit to a very limited extent) in the plaintiff's supposition of conjunctive reading of the provisions. For instance, it would be remiss if this court were to eschew away from rectifying the procedural impropriety if the arbitral tribunal were to mistakenly apply the chosen substantive *lex contractus* under s 30 as the curial or procedural law (instead of the chosen *lex arbitri* or

the law of the chosen seat of arbitration). It is legalistically unbecoming for any party to be left without any remedy (at least in review) if there was a glaring error (as to the appropriate procedural law to be applied) which would make the arbitral award procedurally impaired.

[53] Nevertheless, this court is mindful that this conjunctive reading of s 30 and s 37 of the AA 2005 would only be appropriate if the disputation is purely procedural or regarding the decision making process (and not at all regarding issues of fact and law that go to the merits of the case). In any case, the manner in which the plaintiff attempted to read s 30 with s 37 is entirely not procedural in nature. The reason the plaintiff invoked s 30 was that the plaintiff argued that the issue of time limitation is a substantive law issue (under the Indian law), and thus the majority of the tribunal had allegedly applied the wrong substantive law (being Malaysia's procedural law on time limitation). This leveraging of s 30 on an issue of substantive law cannot fall within the procedural ambit and nature of s 37 of the AA 2005.

[54] Inversely, if for instance the defendant referred to s 30 to be read with s 37 to set aside a hypothetical arbitral award that has mistakenly applied the chosen substantive law (under s 30) as the curial or procedural law of the arbitration, then the defendant's conjunctive reading of these provisions remain within the realm of procedural law (or the decision-making process). This manner of conjunctive reading (regarding the appropriate procedural law) would permit the conjunctive reading of ss 30 and 37.

[55] Thus, although s 30 in itself is not an 'actionable provision' (which could be leveraged as grounds for setting aside), s 37 is sufficiently wide to cover instances in which the decision-making process is impaired due to the wrong application of the proper curial or procedural law (but not substantive law). Nonetheless, this court must highlight a clear limitation and caveat against revisiting or re-examination of merits. Issues of merits and facts to be applied to a certain substantive law are not by any means issues regarding the 'decision making process' by the arbitral tribunal (which is certainly outside the ambit of s 37). But the process of identifying the proper governing procedural law is indeed procedural in the sense of a decision-making process (which may fall within the ambit of s 37 of the AA 2005).

[56] This court agrees that s 37 contains an exhaustive list of grounds to set aside an arbitral award but that does not necessarily mean that matters or issues beyond the exact words of the provision cannot fall within one (or more) of the grounds enumerated under s 37. If any of the listed grounds under s 37 is sufficiently wide to cover such issue or matters, then it is well within the party's right to invoke s 37 to have the arbitral award to be examined by the High Court. Although this appellate court staunchly supports the principle of

minimal intervention, this court cannot support a rigid interpretation of the principle to the extent of absurdity.

[57] Of course, we are aware that the defendant champions the learned JC's reliance on the case of *Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd & another case* [2016] 4 CLJ 927 which had referred to the case of *The Government of India v Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 149 in finding that s 30 cannot be an independent ground to set aside an arbitral award. Nevertheless, we have closely examined the ratio decidendi in the *Cairn Energy* case and found that Mary Lim J's decision (as Her Ladyship then was) in *Cairn Energy* does not accurately support that s 30 cannot be an independent ground to set aside an arbitral award. Instead, the court's ratio decidendi was that the invocation of s 37 of the Arbitration Act can only be invoked if the disputation is in reference to the curial or procedural law of the seat of arbitration (in other words, the decision-making process or procedure and not substantive law). The relevant excerpt of the High Court's decision is as follows:

> [158] I pause here to deal with this matter of the applicable law. *The plaintiff has contended that read with* s 30*, the court should set aside the award under sub-paras 37(1)(a)(iv) and (v); and (b)(ii). By virtue of s 30, the substantive law of the contract is Indian law of contracts*. On the arguments that it had canvassed and which I had set out earlier, the plaintiff contended that the court should set aside the award relying on the Indian Supreme Court decision in *Saw Pipes*.
>
> [159] *With respect, I must disagree. When dealing with challenges under sub-paras 37(1)(a)(iv) and (v); and (b)(ii), the challenge is not determined by reference to the substantive law of the contract.* As the seat of arbitration is Kuala Lumpur, the curial law is that of the seat, that is, Malaysian law; and it remains so even after the award has been granted or handed down.

[58] Although on the same note and score above, the plaintiff also would not be entitled to fashion their grievances against the arbitral tribunal's determination on merits (as an excess of mandate, scope of submission, and jurisdiction under s 37). Thus, the plaintiff's reliance on s 30 to be read in tandem with s 37 (to submit that the arbitral tribunal had re-written the terms of the JOA and PSC, in excess of the agreed terms of JOA and PSC) is equally sorely misplaced (as this is clearly a contention on substantive law and not on procedures or the decision-making process).

[59] In any case, it is pertinent for this court to align itself back to the parties' disputations (in its purest denomination) and examine first the 'means' of which the plaintiff is trying to stake its case before finally making a deeming determination whether or not the plaintiff is entitled to the 'end' it is trying to achieve (that is to prove that the arbitral tribunal had acted in excess of its mandate, scope of arbitration, and jurisdiction). For this court to do so, it must first, insulate itself from the unnecessary labels such as 'jurisdictional issue' or

'excess of jurisdiction' and examine the proper *lex arbitri* in the plain and purest form of disputation (that is between procedural law and substantive law). Only after this harrowing question has been answered that this court can then delve into the determination whether or not the arbitral tribunal had indeed acted in excess of its mandate, scope of arbitration, and jurisdiction.

[60] First and foremost, this court must remark that the parties are in agreement that the *lex arbitri* shall be the law of the seat of arbitration (that being Malaysian law). The only gruelling dissonance here is the question whether time limitation is an issue of procedure or issue of substance. A plethora of authorities were furnished by both parties in which the plaintiff attempts to prove that the issue of time limitation is an issue of substantive law (as opposed to the defendant's attempt to prove that the issue of time limitation is an issue of curial or procedural law.

[61] This is the true and actual 'means' for the plaintiff and defendant to prove and disprove their respective cases. Now, the plaintiff's case by an overwhelming majority rests on this singular issue of time limitation. If this court were to distil the plaintiff's entire case, the plaintiff's argument is plainly as follows:

(a) time limitation is an issue of substantive law and thus should follow the *lex contractus* (being Indian law);

(b) if following the Indian law of limitation, the three years' limitation period would have a majority of the defendant's claim (in the Samson award, the joint account award, and the joint account reconciliation order) be time barred;

(c) since the majority award has applied the Malaysian law on limitation period, the majority award has unlawfully allowed large portions of the defendant's claim (which otherwise would have been caught by the Indian law on limitation period); and

(d) the arbitral tribunal's error and failure to adopt the *lex contractus* (substantive law of India) in determining the issue of time limitation, would mean that the arbitral tribunal has decided the defendant's claim in excess of the tribunal's mandate, jurisdiction and scope of arbitration under s 37(1)(a)(v) of the AA 2005.

[62] Thus, if the plaintiff were to fail at the first hurdle (to prove that time limitation is an issue of substantive law), then the rest of the plaintiff's case would consequently fall through.

[63] But even before this court can endeavor to determine the propriety of this appeal, this court must highlight that it is also aware that this present case's

A disputation also highlights the oft-tricky and thin demarcating line between the determinations of an arbitral award that warrants appellate interference, and those which do not warrant appellate interference.

B **[64]** This court is mindful of the learned JC's attempt in reconciling this tricky demarcation by referring to the difference between the repealed s 42 and the current s 37 of the AA 2005. The learned JC has aptly referred to the Federal Court's decision in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413; [2019] 1 CLJ 1 wherein the FC had agreed with the Court of Appeal's understanding of the difference between the two sections in the following scintillating manner:

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> *An application to set aside an award under s 37 largely deals with issues relating to the award making process and has nothing to do with error of facts and/or law* on the face of record unless the exception applies; such as public policy. *An application under s 42 has nothing to do with the award making process but has everything to do with the award per se and error of law on the face of record which error substantially affects the rights of one or more of the parties.* The distinction between ss 37 and 42 is that like of an apple and an orange.

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E **[65]** But it is exactly this explanation that further highlights the thin demarcating line that the plaintiff is leveraging on. Reason being that time limitation is also an issue of law that substantially affects the parties' positions and at the same time a law relating to the decision-making process (being the curial or procedural law). Thus, in the present case, the confusion arises when
F the learned JC also found that the court would not have had the requisite jurisdiction under s 37 to insist on its own interpretation of the law on limitation (even if the arbitral tribunal were mistaken in its interpretation of the applicable time limitation). Then, further inconsistency arises as the time limitation issue can be caught under s 37 (as an issue relating to the
G decision-making process (or procedure)) and at the same time can also fall within s 42 (as matter or law or fact which can affect the rights of one or more parties). Thus, in the present case, this court would have to deal with a 'procedural provision' which would also (in fact and law) substantially affect the rights and liabilities of the parties.

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[66] Faced with this dilemma, it is pertinent that this court cast much needed light to unravel this Gordian knot. Firstly, specific to arbitral awards involving time limitation issues, it is pertinent that the tests and deliberation be tied back down to the pure determination between what is procedural law and
I what is substantive law. This is in light of the unique or niche circumstance that time limitation can both be considered to be part of the decision-making process (as procedural law) which can be caught under s 37, and also issue of law and fact under s 42. Thus, the mere identification between a matter of decision-making process or a matter of law or fact is not entirely helpful in

specific cases such as the present appeal that involves the law on time limitation.

[67] Thus, if the learned JC has found that time limitation is a procedural issue, then the learned JC must also remain consistent as to find that time limitation (as a procedure) is also an integral part of the decision-making process (which can fall within the ambit of s 37). Thus, this Court of Appeal must depart (albeit very slightly) from the learned JC's ratio decidendi that the arbitral tribunal's decision on time limitation (if indeed erroneous) cannot fall within s 37 of the AA 2005. If indeed the arbitral tribunal had erred in their interpretation of the procedural law on time limitation, then the arbitral award is 'procedurally impaired'. Thus, such procedural impairment would fall within the meaning of 'decision making process' under s 37. Therefore, the High Court is indeed clothed with sufficient jurisdiction to examine the correctness of the arbitral tribunal's decision-making process (in its determination of the time limitation issue).

[68] The High Court in addressing the issue of time limitation must ask the more helpful question, that *is 'whether the disputation is purely procedural or the disputation would also involve the question and examination of merits'.* To this court's mind, if a particular issue or disputation would remain unchanged notwithstanding the merits of a case, then that particular issue or disputation is purely procedural. Alike in an arbitral award involving time limitation, time limitation is a purely procedural issue that is entirely disjointed and unaffected by the merits of any parties' cases. Time limitation is entirely blind to whether or not a party can prove any measure of liability against another. Even if there was any form of civil wrong proven on merits, time limitation shall still prevail if the complaint of such civil wrong was not procedurally voiced out within the prescribed limitation period. Therefore, since time limitation is blind to the substance or merits of the case, it cannot at all be said that time limitation is a matter of substantive law. In this sense, this court is in full agreement with the learned JC's finding that time limitation is a matter of procedural law (and not of substantive law).

[69] A more meaningful expansion of the term 'admissibility' as propounded in the case of *BBA v BAZ*, would be 'procedural admissibility'. Thus, instead of embarking on a lengthy discourse on whether time limitation is a matter of admissibility or jurisdiction, it would be infinitely more helpful to determine whether time limitation is an issue of procedural admissibility or an issue of merit (or substance). Thus, this court is inclined to adopt the expanded meaning of 'procedural admissibility', as opposed to the Singaporean court's classification exercise between a matter of admissibility or jurisdiction. Thus, this court does not entirely follow the test in *BBA v BAZ* to classify time limitation to either be a matter of admissibility or jurisdiction.

[70] The more meaningful classification would be (as this court has previously stressed) is to classify whether or not the matter was purely a procedural issue (which remains unchanged and undisturbed notwithstanding the merits of the case) or a substantive issue (which is indubitably affected by the facts, evidence, and merits of the case). And clearly, time limitation is one procedural issue that is indeed blind to the merits of the case.

[71] This manner of test and classification would effectively reconcile the appropriate approach to a time limitation issue in all aspects (in the face of the differences between s 37 and the repealed s 42, and the Malaysian Federal Court's (in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413; [2019] 1 CLJ 1) classification of matters concerning the decision-making process (under s 37) and issue of law and fact which affects the parties' positions (under the repealed s 42).

[72] Nonetheless, even if the High Court is clothed with the necessary jurisdiction to examine the arbitral tribunal's decision-making process (in applying time limitation), the High Court ought not to interfere with the arbitral tribunal's interpretation and application of the relevant time limitation if the arbitral tribunal's interpretation and application of time limitation is legally sound.

[73] Notwithstanding the slight dissonance within the analysis and reasoning of the learned judicial commissioner, this court is still in agreement with the learned judicial commissioner's final conclusion that the issue of time limitation is purely and strictly a matter of curial or procedural law. Thus, the applicable law of time limitation shall be the governing procedural law of the seat of arbitration (that being the Malaysian law).

[74] We are also in agreement with the learned judicial commissioner's finding that estoppel applies to estop the plaintiff from now denying that the proper curial law of limitation is Malaysian law considering that the plaintiff itself has relied upon the Malaysian Limitation Act 1953 in the plaintiff's own attempt to prove that its counterclaims were not barred by limitation.

[75] Thus, there is no appealable errors within the final conclusion of the learned judicial commissioner's decision. Therefore, we answer issue No (i) in the negative.

Issue No (ii)

[76] It must naturally follow (from the negative answer in issue No (i)) that this court also answers issue No (ii) in the negative. There was never any

instance that the learned judicial commissioner (or the majority of the arbitral tribunal) had unlawfully ignored or abandoned the parties' chosen governing substantive law of the dispute under s 30 of the AA 2005. This is not a case of undue preference of another law in lieu of the parties' chosen substantive law. Instead, the majority award (and the learned judicial commissioner) had simply applied the appropriate curial or procedural law (which also includes the Malaysian law of time limitation). Thus, there was never any transgression against any of the subsections in s 30 of the AA 2005, nor was there any instance of breach of fundamental law or undue preference of another substantive law aside from the chosen law which would be against public policy.

Issue No (iii)

[77] On the same score, since issues No (i) and (ii) were already answered in the negative, it naturally follows that issue No (iii) should also be answered in the negative. Since the learned JC's decision (and the majority award's) in finding that the applicable limitation is the Malaysian law of limitation is sound in law, it cannot at all be said that the learned JC or the arbitral tribunal had wrongfully allowed the defendant's claim in excess of the arbitral tribunal's mandate, scope of submission, and jurisdiction. There has not been any undue application of an improper procedural law that would lead the arbitral tribunal (and the learned JC) to award the defendant damages that would otherwise be time barred by the Indian law on time limitation. Thus, the learned JC is right to find that there could not have been any breach against public policy or the principle of international comity by the arbitral tribunal.

[78] Thus, since the majority award has rightfully found that the defendant's claims (in respect of costs chargeable to joint account, the Samson award and the reconciliation order) were not at all time barred, the arbitral tribunal had then rightfully embarked to determine the defendant's claims (and interpret the terms of the JOA and PSC) upon their merits. Herein, this court is fully minded that the High Court ought not to disturb the arbitral tribunal's deliberation, analysis, and findings on merits (as that would run contrary to the present and prevailing laws after s 42 of the AA 2005 was repealed).

[79] This court is aware that apart from the plaintiff's blanket submission on the issue of time limitation, the plaintiff had also attempted to fashion their grievances against the correctness of the arbitral tribunal's decision on merits, as alleged attempt by the arbitral tribunal to 're-write the terms of the JOA and PSC (and effectively had gone in excess of the parties' agreements and in excess of the arbitral tribunal's mandate, scope of submission, and jurisdiction).

[80] Specifically, against the plaintiff's contentions regarding the majority award's findings (on the costs chargeable to joint account, the Samson award, and the reconciliation order) it was glaring that the plaintiff's chief complaint (apart from the time limitation issue) was the arbitral tribunal's endeavour to interpret and give effect to the terms of the JOA and PSC. This endeavour by the arbitral tribunal is entirely an issue and determination on merits. It has nothing to do at all about the procedure or the arbitral tribunal's decision-making process.

[81] Since the arbitral tribunal has correctly applied the Malaysian limitation law, the arbitral tribunal's decision-making process is legally sound. Anything else beyond that point are already encroaching into the realm of merit which should not be disturbed by the High Court (which the learned JC has astutely opted not to disturb). The propriety of the defendant's entitlement to the costs chargeable to joint account and the Samson award (as well as the reconciliation order) was critically and extensively examined on its respective merits by the arbitral tribunal and thus, should not be ousted or disturbed by the court. Thus, the plaintiffs' attempt to paint the arbitral tribunal's decision on merits as a breach of natural justice, an affront to public policy, and was in excess of its mandate, scope of arbitration, and jurisdiction (by invoking ss 30, 37(1)(a)(iii), 37(1)(a)(v), 37(1)(b)(ii) and 37(2)(b)) is plainly misconceived (and instead a measure of legalistic acrobatic to cloak the plaintiff's primary intention to have this court re-examine the merits of the arbitral tribunal's decision). Thus, the learned JC was correct to find that the plaintiff's complaints have also encroached into the realm of merits which were beyond the High Court's jurisdiction to re-examine on appeal.

[82] Although succinctly, we also must remark that the plaintiff's suppositions that there has been an affront to public policy (on the principle of international comity) and a breach of natural justice (regarding the reconciliation order) were entirely vague and unclear. It is entirely difficult for us to follow the plaintiff's suppositions that the application of the proper limitation law would be against public policy or that the reconciliation order had deprived the plaintiff its rights to be heard. Even if we were to descend from the bench and enter the arbitral arena (which we should not) and examine the plaintiff's contention on the reconciliation order, it is hard to see the plaintiff's contention of being deprived of its rights to be heard *as the reconciliation order was a procedural order for ascertainment of quantum*. The reconciliation order stood to give the plaintiff the opportunity to examine whether the defendant had made any excess cash calls against the plaintiff. The reconciliation order as highlighted by the defendant's counsel, was not at all a substantive order determining the rights of parties. It was an order as to the procedure to ascertain and calculate the exact quantum of damages. And only after all parties have had their day before the arbitral tribunal that the tribunal would conclude

its reconciliation decision. Thus, the learned JC was correct to find that there hasn't been any deprivation of the plaintiff's right to be heard.

THE COURT'S DECISION

[83] Thus, although with minor departures from the learned judicial commissioner's analysis and ratio, we ultimately find that there were no appealable errors as to the learned judicial commissioner's final decision to dismiss the plaintiff's OS in toto. Thus, the present appeal does not at all warrant any appellate intervention.

[84] Hence the appellant's appeal here is dismissed with costs. The learned judicial commissioner's decision is hereby affirmed.

Appeal dismissed with costs; JC's decision affirmed.

Reported by Dzulqarnain Ab Fatar